

Judges on Judging

Making Law the Old Fashioned Way—One Case at a Time

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The initial step in the development of the common law occurred when William the Conqueror became the King of England and agreed that his reign would be subject to existing unwritten customary law. The next significant event occurred when Henry II elected to unify the country under a system of courts rather than a text of words. The end result was an effort to achieve justice through the means of an unwritten law, binding on all, including the King, and proclaimed by judges engaged in resolving controversies in actual cases. As the beneficiaries of the English tradition, American jurists and lawyers have devoted considerable time and effort in debating whether judges make law or merely declare law. Rather than join in that jurisprudential debate, this writing will focus on one particular situation in which a court is unquestionably engaged in making law and attempt to assess the performance of that function.

The State of Maine recently expanded the basis for direct appeal in criminal cases to include an appeal of the sentence. In a somewhat unusual development, the Supreme Judicial Court has been charged expressly with the task of making law. In effect, the court has been transported back in time to the beginning of the common law tradition and faces the task of reaching decisions in particular cases on the basis of little more than notions of justice, common sense, rationality, custom, and prevailing practice. It is not often that the trappings and language of the law are stripped away so completely. An analysis of the lawmaking function as openly practiced under earlier, more primitive conditions might reveal something about the thoughts and behavior of modern lawyers and judges. Moreover, such an analysis might shed light on the judicial function of lawmaking as practiced in its more advanced and elegant form.

Until 1965, Maine had no sentencing law other than the broad categories of sentences authorized by the Legislature. In that year, the Maine Legislature created the Appellate Division of the Maine Supreme Judicial Court and assigned a three-member panel the task of reviewing sentences to the state prison.¹ Because the division was perceived as a tribunal for correcting the most egregious cases of sentence disparity, and not as a lawmaking body, its work was hampered. In twenty-four years of operation, it changed only twenty sentences and produced one useful opinion that included a workable set of crite-

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1. Pub. L. 1965, ch. 419, § 1, codified at ME. REV. STAT. ANN. tit. 15, § 2141-42 (1980), repealed by Pub. L. 1989, ch. 218 (effective Sept. 30, 1989).

ria for distinguishing life sentences from sentences for a term of years. Accordingly, sentencing in Maine remained largely a matter of discretion for the sentencing judge, subject only to the minimum and maximum length of sentence established by statute. Although direct appeal of a criminal sentence was possible in theory, the inquiry on appeal was confined to a determination of whether the sentence was legal, i.e., within the statutory maximum. It is not an exaggeration to state that in Maine, as in many other states, the authority of the sentencing judge was unconfined by law. Sentencing customs and norms, though unenforceable, were sometimes recognized and honored by judges; nevertheless, a comprehensive law of sentencing did not exist.

Gradually, over the years, the need to structure and govern the sentencing judge's discretion became apparent. Maine confronted an increase in serious crime, enhanced advocacy for victims, lengthier sentences, overcrowded prisons, and claims of disparate sentencing. Although the problems were common with many other jurisdictions, in 1989 Maine pursued a distinctive solution by electing to expand the grounds for direct appeal of sentences. Maine rejected legislative sentencing guidelines and charged the judiciary with the task of creating a law of sentencing as a product of the appellate process.² Thus, in a microcosm, we have replicated the conditions that spawned the common law: a small group of judges fashioning law on a case-by-case basis from unwritten custom and practice.

A brief description of the resulting appeal process will suffice. Under the new statute, Maine provides a method of discretionary review modeled on the English system³ and the ABA Standards for Criminal Justice.⁴ A person sentenced to a term of more than one year is entitled to apply for leave to appeal that sentence to the Supreme Judicial Court. The application is screened by a panel of three justices and the application is granted if any one of the justices votes in the affirmative. After screening, the sentence appeal is heard before the full court in the usual manner with briefing, oral argument, and a published opinion. The appellate court is authorized to change the sentence to any disposition that was open to the sentencing court, but the new sentence cannot be more severe than the original. The purposes of the review process are broadly stated and include correcting sentences excessive in length, correcting abuses of the sentencing power, reducing sentencing inequality, and promoting the development and application of rational sentencing criteria. The court is authorized to consider not only the propriety of the sentence but also the manner in which it

2. ME. REV. STAT. ANN. tit. 15, § 2151-57 (Supp. 1990). This legislation is based on a statute proposed by this author in a law review article. Wathen, *Disparity and the Need for Sentencing Guidelines in Maine: A Proposal for Enhanced Appellate Review*, 40 ME. L. REV. 1, 38-40 (1988). The procedure for sentence appeal is now set forth in ME. R. CRIM. P. 40, 40A, 40B, and 40C (adopted effective October 2, 1989). The United States Sentencing Commission Guidelines, 52 Fed. Reg. 18,046 (1987), provide an example of a method of creating guidelines through the legislative and administrative process.

3. For a description of the English procedure for appellate review of sentences, see Wathen, *supra* note 2, at 19-34; D.A. THOMAS, PRINCIPLES OF SENTENCING 365-401 (2d ed. 1979); Meador, *English Appellate Judges from an American Perspective*, 66 GEO. L.J. 1349 (1978); Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193 (1968).

4. STANDARDS FOR CRIMINAL JUSTICE, Standards 20-1.1 to -3.3 (2d ed. 1980 & Supp. 1982).

was imposed and the information on which it was based. It is difficult to imagine a broader charter or a more sweeping mandate for lawmaking.

In the first year of operation approximately 150 defendants have filed applications for leave to appeal from their sentences. The panel has considered ninety-two of those applications, granting twelve and denying the remainder. The Supreme Judicial Court has rendered an opinion in four of the cases and eight remain in the pipeline. It is far too early to determine whether the purposes set forth by the Legislature are being achieved, but it may be an opportune time to review carefully the work product, as well as the performance of lawyers and judges when actually faced with the task of making law. Any shortcomings or defects detected under this microscopic view may be part of a larger infectious process at work in the body of the law.

Because no statement of reason is included in the application for sentence appeal or the order granting it, neither the screening judges nor the defense lawyer knows what the other party had in mind. Accordingly, the analysis of the four cases decided thus far will focus solely on the following three levels: the issue that prompted the granting of the application,⁵ the arguments addressed by counsel, and the decision of the court.

I. STATE V. HALLOWELL⁶

The defendant, a felon, was convicted of unlawfully possessing a firearm⁷ and criminal threatening with a dangerous weapon.⁸ Both offenses carry a maximum sentence of five years' imprisonment. The nature of the offenses committed may be summarized as follows: The defendant walked into the manager's room in a boarding house in which he lived. He was intoxicated, and the manager testified that there had been some rent problems. After a brief verbal exchange, the defendant pulled a revolver from his rear pocket and pointed it at the manager. The manager told the defendant to put the gun away or use it, whereupon the defendant cocked the hammer and spun the cylinder revealing live ammunition. He prevented the manager from using the phone to call the police, but the manager was able to leave the building without injury. The defendant subsequently left, stopped in a parking lot, and fired two shots into a snow bank before going next door to a neighboring apartment where he was eventually apprehended by the police.

The defendant's circumstances offer little basis for mitigation. He is a thirty-seven-year-old unemployed carpenter and high school dropout. Twice married and twice divorced, he has one child whom he consented to give up to adoption. He has had substance abuse problems since he was sixteen and suffers from alcoholism. Although he served in Vietnam and claims to suffer from post-

5. The three-person panel does not record its reasons for granting or denying leave to appeal. The grounds stated herein are those of the author who is one of the three members of the panel.

6. 577 A.2d 778 (Me. 1990).

7. ME. REV. STAT. ANN. tit. 15, § 393 (1980 & Supp. 1989).

8. ME. REV. STAT. ANN. tit. 17-A, § 209 (1983). The Class D offense of criminal threatening is enhanced to a Class C offense if committed "with the use of a dangerous weapon." ME. REV. STAT. ANN. tit. 17-A, § 1252(4) (1983).

traumatic stress disorder, he has never been evaluated or treated. He has an extensive criminal record, including felony convictions of arson, gross sexual misconduct, unlawful sexual contact, aggravated assault, and multiple misdemeanor convictions. The report of the probation office states that "he has a long history of alcoholism and assaultive behavior."⁹ He has been unable to hold a job because of his alcoholism and has served a three-year sentence in Florida prisons and a total of four years in the Maine State Prison. The sentencing judge imposed a sentence of five years on the charge of criminal threatening, suspending all but four years, and ordered four years of probation to commence at the completion of the unsuspended term. A concurrent four-year sentence was imposed on the charge of unlawful possession of a firearm.

The issue that prompted the granting of the application was the need to establish a standard of review and to determine the relationship between the nature of the offenses and the circumstances of the offender. In other words, should the maximum sentence be determined by what the defendant did or should it be influenced as well by a consideration of who he is? The defense counsel submitted a brief in which he argued that the safety of the public could best be protected from a repeat offender whose criminal history stems from long-term alcoholism by shorter sentences with a longer period of probation. He argued that two substantial terms of incarceration failed to induce the defendant to conquer his alcoholism and it was time to try a different incentive.

In response, the State pointed out that the sentencing judge had appropriately recited all of the sentencing factors specified by the Legislature. The State further observed that the sentence was not a maximum sentence nor was it "illegal." Finally, the State assured the appellate court that the record revealed that the sentence was not imposed lightly or with little thought, but, in fact, resulted from a conscious and deliberate evaluation conducted by the sentencing judge. Neither the brief of the defendant nor the State contains any citation of authority other than a passing reference to the statute authorizing sentence review.

In its opinion, the appellate court first directed its attention to the standard of review and stated:

The standard for our review may be described as an examination of sentences for misapplication of principle. It is not enough that the members of this court might have passed a different sentence, rather it is only when a sentence appears to err in principle that we will alter it.¹⁰

Next, the court observed that all criminal conduct is not the same and that the maximum sentence in any given case should be determined in the first instance by a consideration of the nature and seriousness of the offense rather than the circumstances of the offender. The court then identified four aspects of the defendant's criminal conduct which, taken together, justified sentences in the upper twenty-five percent of the sentencing range provided by the Legislature: the display of a loaded firearm in a threatening manner without provocation, the

9. *Hallowell*, 577 A.2d at 786.

10. *Id.* at 788.

discharge of a firearm, the invasion of the victim's home, and the commission of the offenses while in a drunken condition. The court dispensed with defense counsel's argument about incentives by observing that "the degree of mitigation called for by the circumstances of the offender is, in the first instance, a matter for the sentencing judge."¹¹ The court concluded that the sentencing judge was free to reject the defense's suggested strategy for rehabilitating a chronic alcoholic.

II. STATE V. SHORTSLEEVES¹²

The defendant was convicted of murder¹³ which carries a minimum sentence of twenty-five years and a maximum sentence of life in prison. Because Maine has no parole, a person sentenced to life is never eligible for release. A sentence to a term of years, however, results in release at the end of the term minus a deduction of approximately one-third for good behavior. In the case under consideration, the defendant and a companion killed an elderly woman and stole money from her house. During a drinking bout, these two drove by the victim's house. The companion indicated that he wanted to kill the woman, and at some point in the evening they stopped and gained entry by pretending that the defendant had been injured. Once in the house, the companion began to beat the elderly woman, eventually with a billy club and a frying pan provided by the defendant. Both kicked the woman while she was lying on the floor. The defendant searched the house for money and took what was available. In order to ensure that the woman was dead, they found a knife and the companion slit her throat and stabbed her at least nine times in the neck. The jury was instructed on both accomplice and principal liability and returned a general verdict finding the defendant guilty of murder.

The defendant was twenty-one at the time of the killing and had prior adult and juvenile records including convictions for assault, robbery, burglary, theft, and criminal trespass. Released from prison three months before the killing, the defendant was on probation at the time of the offense. Psychological evaluation at the time of sentencing showed that the defendant had a "severe anti-social personality disorder" and suggested a poor prognosis for treatment. An earlier evaluation concluded that the defendant has a "well-entrenched sociopathic disorder." The sentencing justice, finding that the murder was premeditated and accompanied by extreme cruelty, imposed a sentence of life in prison.

The application for review was granted in order to consider the adoption of the existing criteria for the imposition of a life sentence and to determine the applicability of the criteria to an accomplice. The defense counsel ignored any possible difference in the application of the criteria to an accomplice, arguing that this case was dissimilar to those cases in which premeditation and extreme cruelty had been found and similar to another case in which the appellate division vacated a life sentence because extreme cruelty was not present.

11. *Id.* at 789-90.

12. 580 A.2d 145 (Me. 1990).

13. ME. REV. STAT. ANN. tit. 17-A, § 201(1)(A) (1983).

In its opinion, the court adopted the existing criteria and found that two of the criteria for imposing a life sentence were present, namely premeditation and murder accompanied by extreme cruelty. The court first separated the acts of the defendant from those of his companion and required that there be evidence that the defendant acted with premeditation and extreme cruelty in order to justify a life sentence. The court concluded that there was adequate evidence of premeditation on the part of the defendant that the murder was committed with extreme cruelty, and that the defendant knowingly aided in the infliction of such cruelty.

III. STATE V. TELLIER¹⁴

The defendant was convicted on a plea of guilty to charges of kidnapping,¹⁵ unlawful sexual contact,¹⁶ and aggravated assault.¹⁷ The maximum sentences authorized are twenty years, five years, and ten years, respectively. In return for his guilty plea, charges of assault and attempted murder arising out of the same incident were dismissed. The facts concerning the offenses are as follows: In the late afternoon, the defendant forced his neighbor's ten-year-old daughter into his car under the pretext of needing her help in selecting flowers for his wife's birthday. He drove twenty-one miles and parked his car off a deserted dead-end road. After threatening the child with physical harm if she did not engage in certain sexual acts, he removed her clothes, had sexual contact with her, and forced her to have sexual contact with him. He then asked her not to tell anyone what had happened. When she refused, he beat and choked her until she became unconscious and then left her on the ground. She woke up in the middle of the night, cold and frightened, then fell back asleep. When she awoke again at dawn, she managed to find her way back to the main road and summon help. Photographs taken at the time show extensive bruises, lacerations, and apparent burns to her face, arms, and neck.

The circumstances of the defendant are not reflected in the record other than the fact that he had previously been convicted of a charge of Class B theft and was sentenced to three years in prison with all but one year suspended. The unsuspended year was served under intensive supervision rather than in prison. The defendant was still on probation when he committed the subject offense. The sentencing justice did not order a presentence investigation and report, and no inquiry was made at the sentencing concerning the circumstances of the defendant. There was no psychological evaluation. The justice imposed the sentences agreed upon by the prosecution and the defense: maximum sentences of twenty years for kidnapping, five years for unlawful sexual contact, and ten years for aggravated assault with all but four years suspended and six years probation. The court ordered that the sentences be served consecutively.

14. 580 A.2d 1333 (Me. 1990).

15. ME. REV. STAT. ANN. tit. 17-A, § 301 (1983).

16. ME. REV. STAT. ANN. tit. 17-A, § 255 (1983 & Supp. 1989).

17. ME. REV. STAT. ANN. tit. 17-A, § 208 (1983).

The issues that prompted the granting of the application were the legality of the consecutive sentences, the sufficiency of the information on which the sentences were based, and the effect of the plea bargain upon the review of what might otherwise be considered as excessive sentences. The defense brief argued correctly that consecutive sentences for kidnapping and sexual contact were prohibited by statute. Maine law prohibits consecutive terms for crimes arising out of the same criminal episode when one crime consists only of a form of preparation to commit, or facilitation of the other. With regard to the length of the sentences in general, the defense counsel argued that the defendant's lack of a serious prior record and his age made him a good candidate for rehabilitation. He also argued that the remarks of the sentencing justice revealed that he was improperly influenced by a legislative amendment, subsequent to this case, increasing to forty years the authorized sentence for kidnapping. The State sought merely to defend the factual basis for consecutive sentences and argued that the kidnapping was not meant to facilitate the sexual contact.

The court ruled that the consecutive sentences for kidnapping and unlawful sexual contact were prohibited by statute. The court declined to impose substitute sentences because of the total absence of any information concerning the defendant's circumstances in the record. Noting the absence of a presentence investigation, the court emphasized the desirability of such a procedure whenever significant incarceration is a possibility, but stopped short of requiring it. The court ruled that sentences were not insulated from review because they resulted from a plea bargain and the agreement of the parties. The court ruled that "[t]here are greater public interests at stake in sentencing than those of the prosecutor and the defendant. All sentences, even those agreed upon by the parties, are subject to appellate review and must be demonstrably appropriate to the circumstances of the case."¹⁸

IV. STATE V. ST. PIERRE¹⁹

The defendant was convicted of murder²⁰ and faced a sentence range of twenty-five years to life. On the date in question, the defendant claimed to have smoked marijuana, consumed twelve to fifteen drinks, and consumed other drugs, including three grams of cocaine and psychedelic mushrooms. During the evening, he met the victim, a young, deaf mute woman, in a bar and she voluntarily accompanied him to his room at the end of the evening. In his testimony before the court, the defendant explained that while they were engaging in oral sex, the victim bit his penis and punched him. He reacted angrily and struck her many times in the head with a jackhammer bit and then strangled her. He then carried her from his room to a river nearby and dumped her in the river. The evidence is inconclusive as to whether the victim was still alive when he threw her in the river.

18. *Tellier*, 580 A.2d at 1343.

19. 584 A.2d 618 (Me. 1990).

20. ME. REV. STAT. ANN. tit. 17-A, § 201(1)(A) (1983).

The defendant, twenty-years old at the time of the offense, is a high school dropout with a non-violent misdemeanor record. He lived in a single room above a restaurant and bar where he worked occasionally as a disc jockey and bouncer. He supplemented his income by selling small amounts of cocaine and marijuana. The presentence report, prepared by the Department of Probation and Parole, likened the defendant to a serial killer and recommended a life sentence, stating that "in light of the predatory nature of the defendant choosing his victim, the violence and brutality of the killing, and the concern for the protection of the public from this type of defendant, it is recommended that the sentence in this case be commitment to the Department of Corrections for the remainder of the defendant's natural life." Nothing in the report supports the conclusion that the defendant is a serial killer. The prosecuting attorney recommended a fifty-year sentence at the time of sentencing. The sentencing justice, without referring to the presentence report, imposed a sentence of life on the basis that the killing was accompanied by extreme cruelty and sexual abuse.

The application was granted in order to determine whether the criteria for a life sentence had been satisfied. The brief for the defense argued that the facts of the case were similar to the facts in *State v. Haberski*,²¹ and less egregious than the facts in other cases involving a life sentence. In attempting to justify the life sentence, the State drew an analogy between the requirement of extreme cruelty and similar formulas used in other jurisdictions to distinguish between a life sentence and a sentence of death by execution. Relying on the analogous authority, the State argued that extreme cruelty could be found either from the nature of the killing, the effect on the victim, or the attitude of the killer. Focusing upon the number of blows and the possibility that the victim was still alive when dragged to the river and thrown in, the State argued that the sentencing justice was justified in making a finding of extreme cruelty.

In its opinion, the court vacated the life sentence and imposed a sentence of forty-five years. The court held that the defendant's conduct did not "evidence the extremely vicious quality that would constitute extreme cruelty."²² The court attempted further definition as follows:

Imposition of a life sentence on the basis of extreme cruelty alone will require a showing that the viciousness of the murder differed in a substantial degree from that which inheres in the crime of murder. As the Appellate Division stated in *State v. Haberski*, No. AD-85-54 (Me. App. Div. February 6, 1987), "if acts of murderous cruelty could be arranged on a continuum, the phrase 'extreme cruelty' would delineate the outermost portion of the range."

. . . the savagery of this killing is unquestioned, but the evidence clearly points to the fact that St. Pierre's acts, unlike those in other cases where our courts have imposed life sentences, did not involve torture or other gratuitous suffering inflicted on the victim.²³

21. No. AD-85-54 (Me. App. Div. Feb. 6, 1987) (Defendant dragged his wife into the woods, repeatedly hitting her with a gun which discharged on several occasions, and killed her. Her body had approximately thirty injuries; she had been shot three times. The Appellate Division, finding that this crime did not evidence extreme cruelty, replaced the Superior Court's imposed life sentence with a sentence of fifty years.) (*As discussed in St. Pierre*, 584 A.2d at 618.

22. *St. Pierre*, 584, A.2d at 621.

23. *Id.* at 621-22.

The court also intimated that the defendant might be entitled to mitigation because of his youth, lack of a serious criminal record, prospects for rehabilitation, and the absence of a significant threat to the public. The court resentenced the defendant to a term of forty-five years and explained the sentence in the following terms:

In *Haberski* the Appellate Division described the pattern of sentencing for murder during the first eleven years under the Criminal Code, concluding that the average of sixty-six sentences was approximately 34 years. *Haberski*, No. AD-85-54 at p. 5 n.3. Giving consideration to all of these factors, we conclude that a term of forty-five years is an appropriate sentence, warranted by the seriousness of the offense, but more in line with other sentences.²⁴

Before turning to an analysis of the cases decided thus far, it should be observed initially that the number of applications for leave to appeal under the new procedure remains quite small. The former system involved a disincentive for appeal—sentences were subject to increase as well as reduction, and in fact some were increased. In a typical year, eighty defendants would appeal their sentence under the old system. Despite the fact that appeal from sentence now involves no risk of an increased sentence and the further fact that the sentencing judge is required to advise each defendant about the right to seek sentence review, the number of appeals rose only to 150. It is reasonable to estimate the total number of defendants eligible for sentence review as exceeding 1500. It is difficult to explain the small number of appeals on the basis of a slow reaction to change on the part of the bar and criminal defendants. Maine has had a form of sentence review available for twenty-four years, and that should be sufficient time to accommodate adaptive delay.

The small number of appeals may result from a belief, deeply ingrained in the mind of the local legal culture, that sentencing involves a virtually unreviewable act of discretion and that relief on appeal could only result from an act of grace. Even though the law commonly regulates and structures the exercise of discretion, sentencing discretion is treated differently. There may be good reason for some difference in treatment. Sentencing is an intensely personal task for all participants, and the sentencing decision is as complex as the person sentenced. In this one area, the law attempts to judge people individually rather than as part of a group. Great freedom is given the judge to assess who the defendant is and what he did. When properly conducted, the sentence hearing involves emotion as well as reason and it produces a gestalt. The actual basis for a sentencing decision is not easily described (in most cases the attempt is unsuccessful), nor is it easily analyzed. Lawyers may hesitate to challenge sentencing decisions because the usual language and method of the law inadequately address the problems presented in criminal sentencing.

Despite Justice Holmes' observation that the life of the law has been experience rather than logic, it is usually referred to as a rational process and described in rational terms. Moreover, the law usually gives the appearance of being rational, if for no other reason than the fact that it represents the latest

24. *Id.*

development in an ongoing process of legal analysis and criticism. In its embryonic state, however, the law has no analytical labels. Under such circumstances, the rationality of the law is judged solely from its expression and its result, as measured against external standards. It is possible that judges and lawyers might shrink from such a task. The question, simply put, is whether the law is capable of addressing society's need for achieving a degree of justice and parity in sentencing while maintaining some semblance of balance between the number of prison beds and the number of prisoners. If not, why not?²⁵

It is apparent that judges and lawyers are not completely comfortable in relying on custom as a source of law. Custom has always been unwieldy. It is usually expressed as an impression gleaned from collective experience rather than an empirical fact. Obviously, the validity and persuasive force of an expression of custom depends entirely on the credentials and experience of the person or body making the statement. Although such an expression is difficult to prove or disprove, it is easily and effectively challenged by any instance of deviation. It is noteworthy that in the four cases under study, no lawyer has sought to argue on the basis of sentencing custom. Is the impression of an experienced and able trial lawyer of no value? As appellate judges are further and further removed from trial practice, judges may have little confidence that they are familiar with sentencing custom. In *St. Pierre*, the court relied on custom, but did so without openly acknowledging the fact. In resentencing the defendant to a term of forty-five years, the court is really reflecting its perception of the customary sentence for this type of a homicide. Although the court decision recites some supporting statistics, the actual basis for the sentence is a judgment call concerning the length of a customary sentence. Should such a basis be frankly stated, discussed, and criticized, or should it be obscured in the interest of preserving the perception of rationality?

None of the advocacy thus far involves any attempt to analyze the structure and purpose of sentence review. It would seem that the legal analysis of the propriety of any sentence should rest upon a greater goal than a favorable result in that one case. Some general features of a sentencing scheme should be identified and agreed upon. Certainly, there are areas of confusion and many unresolved points, but there must be points of agreement. It is certain that strict uniformity in sentencing is not the goal because that could easily be achieved by providing one sentence for each offense. The legislature recognizes that a variety of criminal conduct is included within one generic offense and that offenders differ greatly in terms of culpability and risk to society. The unquestioned goal is to sentence similar types of offenders who commit similar offenses to roughly similar sentences. It therefore becomes necessary to loosely categorize offenses and offenders and establish some functional relationship among the three components of the sentence: the nature of the offense, the nature of the offender, and the need to protect the public.

25. Many of the problems observed in creating a law of sentencing were anticipated and made the basis of a writing assignment in a legal textbook. J. WHITE, *THE LEGAL IMAGINATION* 363 (1973).

At least until the decision in *Tellier*, it was possible to impose the maximum sentence and rely solely on either a heinous offense, a culpable defendant, or great risk to the public. The law tends to avoid categorical conclusions and it may be desirable generally to keep options open for future cases. When dealing with such fundamental questions, however, certainty is essential. If any one of the three components of the sentence can serve as the basis for determining the maximum sentence, then the task of comparing sentences is indeed complex. A three-point comparison of sentences is significantly more difficult than comparison with reference to a single component. Accordingly, the determination of the relationship among the three components of a sentence is crucial. A number of possible arrangements exist. The nature of the offense could determine the maximum sentence and the circumstances of the offender could be considered only in terms of mitigation. This is the approach suggested in *Hallowell*. It is possible, however, that the offender's circumstances could also be considered as an aggravating factor. The more difficult question, however, is how to factor in the need to protect the public. Should risk to the public be used solely as a means of determining which defendants to incarcerate and which to place on probation? Should it be confined to offsetting mitigating factors? If the defendant presents a high risk of reoffending, should that be considered as a basis for increasing the allowable maximum sentence? The answer is not immediately evident, but it is clear that any valid analysis must attempt to resolve these fundamental questions. Haphazard comparison or an appeal to an abstract concept of justice will not suffice.

Once the fundamentals have been established, the law must attempt to fix a scale within the statutory maximum. To do so, it is necessary to assign sentencing ranges with reference to categories of commonly recurring factual patterns and to categories of offenders. Although most would agree that judges may draw upon their experience to discern the common categories, not all would agree that the methods and language of the law should openly consider and discuss such things as average lengths of sentences and the availability of prison space. Is the common law method confined to dealing on a high level of abstraction, or is it capable of openly grappling with the real issues? Stated another way, are judges capable of pronouncing that a sentence shocks the conscience but incapable of openly ruling upon the rational allocation of a scarce and expensive resource—prison space?

It is not entirely surprising that a system that confers authority in direct proportion to the degree of separation between the event and the proceedings would tend to lean toward abstraction. Although reliance on a familiar abstraction may serve to legitimize a decision, it does little to ensure that the result is sound. Moreover, abstractions sometime mask factual assumptions and obscure the actual basis for decision, thereby frustrating any effort at responsible criticism and stifling the possibility of development and improvement. Establishing sentencing ranges for commonly recurring factual patterns is a task that lends itself to a degree of empirical research and investigation. Although the common law method is capable of receiving, evaluating, and reflecting empirical knowledge, thus far the participants in sentencing appeals have chosen the comfort and ease provided by reliance on abstraction. No one has even hazarded an

attempt at providing an average length of sentence for a particular offense or the census figures for jails and prisons. Although such statistical information is not readily available, it does exist and could be used effectively despite obvious shortcomings in the method of collection. If rationality or the appearance of rationality is important to the law, and if reliance on judgment and experience is to be obscured or minimized, it is essential that the law be informed by something beyond abstraction, anecdote, and analogy.

Even a cursory review of the sentencing appeals reveals that all of the participants, lawyers, and judges rely almost exclusively on a familiar form of linear thinking and reasoning by analogy. Lawyers almost invariably conclude that whatever took place in the past is correct and that the task of the advocate is to demonstrate similarity or the absence of it. Judges respond to such advocacy with the same type of reasoning. Although analogy is useful in making incremental steps in advancing or retarding a developed doctrine, it is less useful when formulating the doctrine. Here a broader frame of reference is required. It is not enough that the sentence is similar to another; rather the question is whether each sentence is based on a formulation that is workable and produces desirable results.

Similarly, lawyers restrict both their inquiry and their advocacy to a narrow range of authority. It is difficult to believe that in the first four cases under the newly enacted procedure for sentence appeal no one has cited the law review article or any of the English material on which the statute was based. It is equally difficult to believe that useful material could not be found in the archives of social science and the academic community. For example, the philosophical debate over the basis for punishment bears directly upon the determination of the proper relationship among the components of a sentence. In this regard, lawyers display a rather complete lack of imagination. Because the common law court is dependent on advocacy and because judges are lawyers, the work product of the court is cursed with the same affliction. On occasion, lawyers and judges need to recharge their imagination by diverse life experience and resort to literature. Imaginative writing is to the law what the experimental laboratory is to science. Writers and poets draw upon sources unknown to the law in imaging the conscious and unconscious experience of the individual and society.

The law generally ignores the science of etymology and accepts language at face value. It usually opts for a single, contemporary, and unchanging meaning. Who knows what meaning lies buried in the Latin words *extremus crudelis*? Even the simple image of the extreme or outermost edge of a field or forest might assist in understanding the meaning of extreme cruelty. One need read only a little theology or depth psychology to discover the rich levels of meaning that other professions find embedded within words and images.

In an effort to appear rational, the language of the law is further restricted by the practice of avoiding the use of words expressing ethical judgment, emotion, feeling, intuition, or instinct. The law ignores what is otherwise openly acknowledged: There are times when no single meaning of a word is sufficient. Language occasionally breaks down completely and communication occurs only through the use of symbols. At times only an image can connect experience with

the mind. The problems associated with sentencing require an expanded legal vocabulary. Dogged reliance on *Black's Law Dictionary* and reasoning from analogy will not suffice. It may prove necessary to rely on images and symbols other than the black robe and the raised bench.

In writing this description of a modest experiment in lawmaking, I have come to realize that, in the end, I reveal my own shortcomings as a judge. I confess, I am resistant to change, and I do exhibit a decided preference for the familiar. In my work I value the appearance of rationality, at times even to the point of pretense. Although I realize that I rely on nonrational factors, I tend to obscure that fact whenever possible. I sometimes attempt a detailed analysis without first grasping the fundamentals. I am at my best and my worst when dealing in abstractions. Finally, in attempting to make a common law of sentencing I have learned that both my method and my language are severely limited, and I must continuously struggle to unite the outer and inner decision. It is just possible that I may also have revealed similar defects in the art of lawmaking as it is currently practiced.

